

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

PETITION OF DUKE ENERGY INDIANA, LLC)
PURSUANT TO IND. CODE §§ 8-1-2-42.7 AND 8-1-2-61,)
FOR (1) AUTHORITY TO MODIFY ITS RATES AND)
CHARGES FOR ELECTRIC UTILITY SERVICE)
THROUGH A STEP-IN OF NEW RATES AND CHARGES)
USING A FORECASTED TEST PERIOD; (2) APPROVAL)
OF NEW SCHEDULES OF RATES AND CHARGES,)
GENERAL RULES AND REGULATIONS, AND RIDERS;)
(3) APPROVAL OF A FEDERAL MANDATE)
CERTIFICATE UNDER IND. CODE § 8-1-8.4-1; (4))
APPROVAL OF REVISED ELECTRIC DEPRECIATION)
RATES APPLICABLE TO ITS ELECTRIC PLANT IN)
SERVICE; (5) APPROVAL OF NECESSARY AND)
APPROPRIATE ACCOUNTING DEFERRAL RELIEF;)
AND (6) APPROVAL OF A REVENUE DECOUPLING)
MECHANISM FOR CERTAIN CUSTOMER CLASSES)

CAUSE NO. 45253

**VERIFIED MOTION FOR CLARIFICATION AND APPEAL TO THE FULL
COMMISSION OF THE PRESIDING OFFICERS' OCTOBER 28, 2019 DOCKET
ENTRY DENYING MOTION TO AMEND PROCEDURAL SCHEDULE
AND FOR APPROPRIATE RELIEF**

The Indiana Office of Utility Consumer Counselor (“OUCC”), Citizens Action Coalition of Indiana (“CAC”), Environmental Working Group, Indiana Community Action Association, Indiana Laborers District Council, The Kroger Co., and Sierra Club (“Joint Movants”),¹ by counsel and pursuant to 170 IAC 1-1.1-25, respectfully submit their Motion for Clarification and Appeal to the Full Commission of the Presiding Officers’ October 28, 2019 Docket Entry denying Joint Movants’ Motion to Amend Procedural Schedule and for Appropriate Relief² before the Indiana Utility Regulatory Commission (“Commission”). Joint Movants respectfully request that the Commission reverse the decision of the Presiding Officers and grant Joint Movant’s Motion to Amend Procedural Schedule and for Appropriate Relief. In support of its appeal,³ Joint Movants state:

¹ The undersigned counsel has the authority to represent that the Duke Industrial Group, Nucor, and Walmart support the requested relief proposed in Joint Movants’ Motion of October 15.

² Requested relief for Expedited Briefing was granted on October 18, 2019.

³ Joint Movants incorporate by reference their *Joint Motion to Amend Procedural Schedule, for Appropriate Relief, and for Expedited Briefing* (filed on October 15, 2019) and their *Joint Reply to Duke Energy Indiana Response to Motion to Amend Procedural Schedule, for Appropriate Relief, and for Expedited Briefing* (filed on October 24, 2019).

1. The Commission should overrule the October 28 docket entry because it is contrary to law as well as the logic and effect of the circumstances presented here and replace it with an order consistent with the applicable law and facts granting the relief sought and supported by Joint Movants in their Joint Motion and related Reply.

2. The fundamental questions presented by the October 28 docket entry are whether the Joint Motion and Reply establish “good cause” for the relief requested, “due diligence” by Joint Movants in seeking that relief, and prejudice to Joint Movants if that relief is denied. The relevant authority supports that the relief be granted. Ind. Code § 8-1.2-42.7(h) says, in part, “The commission may suspend the three hundred (300) day deadline set forth in subsection (e) one (1) time for good cause.” Ind. Code § 8-1-2-47 provides that, “The commission shall have power...to regulate the mode and manner of all investigations of public utilities and other parties before it”. 170 IAC 1-5.2-1(e)(2) states, in part, “the presiding officer may do the following: ... (2) Extend the procedural schedule to twelve (12) months for good cause.” Ind. Trial Rule 53.5 provides in relevant part: “Upon motion, trial may be postponed or continued in the discretion of the court, and shall be allowed upon a showing of good cause established by affidavit or other evidence.... A motion to postpone the trial on account of the absence of evidence can be made only upon affidavit, showing the materiality of the evidence expected to be obtained, and that due diligence has been used to obtain it . . .” *See also Plank v. Comty. Hosps. of Ind., Inc.*, 981 N.E.2d 49, 53-54 (Ind. 2013), and *U.S. v. Olano*, 507 U.S. 725, 734 (1993). Joint Movants have met their obligations in establishing “good cause” for the relief requested, “due diligence” in seeking that relief, and prejudice to Joint Movants if that relief is denied.

3. Joint Movants are concerned about both the ruling and the precedential nature of the docket entry insofar as it is unclear and appears to imply changes to the Commission’s processing and regulation of rate cases. Specifically:

a. The docket entry appears to imply that Minimum Standard Filing Requirements (“MSFRs”) and General Administrative Order (“GAO”) 2013-5 do not apply to rate cases when the 300-day schedule under Ind. Code § 8-1-2-42.7 is extended voluntarily past the 300-day deadline by the Petitioner and other parties. Docket Entry, p. 2.

b. The docket entry appears to imply that the requirements within the MSFRs and GAO 2013-5 do not need to be met at the time the utility files its case or at any time thereafter and have no bearing in terms of the minimum requirements to be satisfied by the utility in terms of data and transparency or any ramifications to the procedural schedule. *Id.*

c. The docket entry appears to imply that because of the extra 60 days agreed to at the beginning of the rate case schedule, a delay, even under extraordinary circumstances like these and even under good cause such as here where parties would otherwise be prejudiced if the relief is denied, will not be entertained by this Commission since “[t]he workings of Ind. Code § 8-1-2-42.7 do not invoke the GAO or MSFR rule in the timing of when temporary rates can be submitted, reviewed, and made effective.” *Id.*

d. At the same time, the docket entry appears to combine Duke's obligation to file documents under the MSFRs and GAO 2013-5 with the substantive requirement to provide such information that is transparent, complete, and can be properly evaluated, and implies that not filing an objection to the former represents a waiver of the latter, while also finding that the same requirements within the MSFRs and GAO 2013-5 are moot because of the extra 60 days included in the agreed procedural schedule and because "Ind. Code 8-1-2-42.7 do[es] not invoke the GAO or MSFR rule" in terms of the timing of temporary rates. *Id.* Rather, the facts are that the Joint Movants raised the issue with the defective substance of the filing as soon as it was discovered because the Joint Movants were unable to conduct a proper evaluation before the deadline to file their testimony, despite attempting to address the issues for almost two months with Duke. And, as discussed below, the statute does not explicitly preempt the GAO or MSFR rule; rather the GAO was written with explicit reference to Ind. Code § 8-1-2-42.7.

e. The docket entry appears to imply that it is acceptable for Petitioner utility companies not to offer transparent cost of service studies, or disclose to the parties or the Commission that there will not be a transparent cost of service study ("COSS"). The entry also implies that non-utility parties are not entitled to transparent cost of service studies unless and until individuals representing the parties and the Commission travel to the utility's location to become familiar enough with the utility's new "black box" COSS to understand the basic information underlying the utility's rate increase; otherwise, the docket entry implies that the non-Duke parties and the Commission must rely on Duke's information without the ability to verify the data. *Id.*

f. The docket entry appears to imply that one party's notice of intent not to respond to the Company's motion for leave to amend its case (which is **not** the issue raised in *Joint Motion to Amend Procedural Schedule and for Other Appropriate Relief, and for Expedited Briefing*) somehow extended a "waiver" from that party to the rest of the non-Duke parties. *Id.*

4. Joint Movants further respond to the docket entry and request the Commission to consider the following in this Appeal to the Full Commission:

a. The parties, including Duke, voluntarily agreed to the current procedural schedule to 1) navigate around the holidays in November-January, 2) address the stated concern about the many years' worth of cumulated materials and issues relevant to this general rate case since Duke's last general rate case conducted approximately 15 years ago that was prior to its latest merger, and 3) address the stated concerns about the scope of requests that would be in the rate case that Duke laid out for parties at filing preview meetings.

b. The agreement to extend the 300-day rate case schedule by 60 days should not now be rewritten to imply that the non-Duke parties agreed to waive any ability to request further changes to the procedural schedule, especially when Petitioner did not meet the basic evidentiary and substantive requirements with its filed case even as amended.

Joint Movants agreed to the extra 60 days at the beginning of the case after weeks of negotiation prior to Duke filing its case-in-chief. In other words, Joint Movants agreed to this schedule without any knowledge regarding the COSS and the other issues and numerous deficiencies contained in Duke's case-in-chief. Duke did not discuss any issues with its COSS with Joint Movants during the multiple filing preview meetings and prior to negotiating and agreeing to a procedural schedule. Joint Movants' lack of knowledge in this regard combined with a poorly formed case are of Duke's making and the docket entry resolving these issues unfairly clearly cuts into the non-Duke parties' time period to prepare their own cases.

c. The amendments to Duke's case-in-chief on September 9 and to Duke's MSFRs and workpapers on September 26 were not placed at issue in the Joint Motion filed on October 15. Throughout September, Joint Movants were trying in earnest to work with Duke to find a solution to the issues with the lack of information in the Petition. In the Joint Motion, Joint Movants identified that the issues involving the deficiencies in the filing were separate from the amendments filed on September 9. Moreover, Joint Movants had previously notified Duke about the necessity of finding appropriate solutions to the issues outlined in the October 15th Joint Motion, including but not limited to an extension to the testimony filing deadline and a fully transparent COSS, including linked Excel files. In short, it took several weeks for Joint Movants to uncover these issues and to see if a partial or complete resolution with Duke was possible that would still afford parties enough time to prepare their case to respond to the extraordinary requests Duke has combined in this rate case.

d. The availability of Duke's model at the Plainfield office would not solve many of the issues uncovered and additionally would be unduly burdensome to the non-Duke parties. Many consumer parties rely on out-of-state or out-of-entity witnesses for various reasons. It would be burdensome and require considerable additional cost to fly these witnesses, pay for their lodging and other expenses, likely require additional time and expense to be trained on and otherwise become familiar with this new model to even understand the basic functions and formulae of the model before finally understanding the utility's basic information underlying its request in this case. Just familiarizing an expert with a new model could take days, if not weeks, depending on how complex the model is.

e. As seen in the affidavits of Mr. Wallach and Mr. Watkins attached to the October 15th Joint Motion, experts who practice nationwide have never encountered such a situation as this, in which a general rate case petition contained deficiencies such as this. Duke did not raise the issue at all with regard to the new model used or the defective information provided as the COSS when negotiating with the parties about the procedural schedule. Only when explicitly asked for and pressed for an Excel based replica did Duke provide such – a process which took weeks of iterations before the result became usable to Joint Movants.

f. If the Commission stands by the findings in this docket entry, Joint Movants are concerned other utilities will provide information in future rate cases that lacks transparency and sufficient detail to conduct a proper evaluation. In turn, Joint Movants

are concerned that the basic flow of information will be stymied as the ruling will allow utility companies generally to move to this approach and thereby require other parties, and presumably the Commission, to expend additional resources to fully and transparently verify the information and present their own evidence against or in support of such requests. When a utility company instead provides this information in a transparent manner, such as previously seen with an Excel-based format with formulae intact and with a proper chain of evidence, it alleviates the burdens experienced in this proceeding. In fact, Joint Movants have understood this method to be standard practice before this Commission, as well as other Commissions nationwide, and this practice is supported in a synthesized reading of GAO 2013-5 with the Commission's MSFR rule. The docket entry seems to imply that Ind. Code § 8-1-2-47 somehow preempts the MSFRs and GAO 2013-5; yet, there is nothing in the statute stating so. *See also Ward v. Carter*, 90 N.E.3d 660 (Ind.), cert. denied, 139 S. Ct. 240, 202 L. Ed. 2d 161 (2018) (finding that an agency regulation carries the effect of law when it prescribes binding standards of conduct for persons subject to agency authority). Furthermore, the GAO explicitly references Ind. Code § 8-1-2-47. To explain further, the existing MSFR rule at 170 IAC 1-5-1 *et seq.* was written at a time when forward-looking test years were not permitted and when many of these filings were done on paper (filed October 28, 1998, and subsequently readopted in later years). Thus, the MSFR rule must be read in conjunction with the later issued GAO 2013-5. GAO 2013-5 II.A.2(b) states, "While recognizing the MSFR contemplates a historic test period, Indiana Code §8-1-2-42.7 allows a utility to file within 270 days of the close of the historic test period." It goes on to say that, "If the utility proposes a forward-looking or hybrid test year as authorized by Ind. Code §8-1-2-42.7, the MSFR should still serve as guidance as to the categories of information that are appropriate for inclusion as working papers." The GAO elaborates on what is needed in addition to the MSFRs when a forward-looking test year is used at GAO 2013-5 II.A.2: "(c) If the utility chooses a forward-looking test period, the utility should also provide supporting documentation, including any supporting calculations, for any changes between the historic base period and the test period chosen. Each change to the historic base period should be reflected as an individual adjustment in the revenue requirements schedules and explained in testimony. (d) To the extent a forward-looking test year employs a model, that model must be completely transparent, the assumptions fully explicit, and the results fully replicable by any party and by Commission staff."

g. Joint Movants exercised due diligence and showed good cause⁴ for the extension of time requested in the October 15th Joint Motion under these extraordinary circumstances. To the extent the docket entry implies Joint Movants waited too long to file their motion, Joint Movants assert they exercised due diligence to obtain the information needed and then to present it in an intelligible fashion:

i. As the Joint Movants evaluated Duke's filing, certain parties discovered the scope of the fundamental problems with the Company's case-in-chief with respect to chain of evidence for cost-of-service and revenue requirements

⁴ See Paragraph 4 of the *Joint Reply to Duke Energy Indiana Response to Motion to Amend Procedural Schedule, for Appropriate Relief, and for Expedited Briefing* filed on October 24, 2019, for legal authority supporting Joint Movants' requested relief.

at both present and proposed rates in late August which was less than 60 days after Duke filed its Petition. This timeframe is reasonable in terms of “due diligence” precisely because it is the same timeframe in which CAC Witness Wallach and JIs’ legal team found and declared the situation to be extraordinary based on their own independent “due diligence” for Mr. Wallach’s testimonial purposes.

ii. These parties began communicating with Duke’s counsel, and other parties who would be interested in the COSS issue in particular, almost immediately thereafter, with the initial focus being on the COSS and the integration of the COSS with the Company’s accounting revenue requirement exhibits, MSFRs, and work papers at present and proposed rates, the Company’s financial forecast, and the Company’s load forecast. Thereafter, Joint Movants worked with Duke continuously on those matters until the Joint Movants drafted and filed the Joint Motion.

iii. Duke filed its Amended Case-in-Chief on September 9 with the amended MSFRs and workpapers on September 26, 2019. A fair reading of CAC’s Unopposed Motion filed on September 18, 2019, for a two-day extension of time to evaluate whether to respond to Duke’s Petition to Amend must focus on its express statement that CAC needed the additional time to determine “whether it would like to directly respond to Duke’s Motion to Amend Petition, *or seek other relief from this Commission at a later date*” (emphasis added). The plain and necessary implication of CAC’s timely filing two days later not to respond to the Amended Case-in-Chief should have been understood to mean that CAC would “seek other relief from this Commission at a later date” and not that Duke’s Amended Petition and Case-in-Chief resolved CAC’s problems with the Company’s case. Duke’s counsel knew first-hand what CAC was thinking and implying with this language, because CAC’s counsel was communicating with Duke’s counsel on an ongoing basis regarding the problems and what its witnesses believed would be necessary to resolve them, i.e. fixing the deficiencies and extending the procedural schedule.

iv. CAC counsel had a draft motion written by October 9 for review by and discussion with other non-Duke parties with similar concerns, and Joint Movants filed the Joint Motion in its final form with the Commission on October 15. These six days represents due diligence on Joint Movants’ part insofar as it took time to solicit input from other parties who ultimately joined the motions and to work on and incorporate the affidavits from expert witnesses on top of still moving forward with preparing our case and other obligations in other cases and work matters.

5. Joint Movants have established “good cause” for the relief they have requested by showing the failure of Duke’s case-in-chief to present a prima facie case sufficient to meet Petitioner’s burden of proof and going forward with the evidence, in that it fails to provide a transparent, verifiable “chain of evidence” for the Company’s cost of service and revenue requirements at either present or proposed rates. Joint Movants also showed due diligence by

timely raising their concerns directly with Duke, communicating and negotiating with Duke to resolve their concerns, and then filing their Joint Motion within a week of being advised by the Company that it would not agree to the relief sought by Joint Movants—a filing which was made a full 15 days before Joint Movants’ own direct testimony was scheduled to be prefiled. Joint Movants have also shown that their collective “no response” to Duke’s Motion to Amend the Petition should not and could not reasonably be interpreted as a “waiver” of their right to seek the relief sought in the Joint Motion. Finally, Joint Movants have shown by facts supported by affidavits precisely how the Company’s failure to provide a transparent, verifiable “chain of evidence” for its claimed cost of service and revenue requirements at either present or proposed rates has prejudiced Joint Movants in developing their own responsive cases-in-chief. In addition, Joint Movants have shown, as a matter of law, that the Commission’s published rule and administrative order relating to MSFRs in general rate cases have not been pre-empted by I.C. § 8-1-2-42.7. Accordingly, the full Commission should overrule the October 28 docket entry and issue an order granting the relief requested by Joint Movants, as well as any other relief just and proper under the circumstances.

6. Joint Movants’ requested relief was and continues to be reasonable insofar as the issues with Duke’s case previously prevented and continues to prevent Joint Movants from presenting their complete cases-in-chief responding to the Duke’s case. Joint Movants have been and continue to experience major data quality issues from Duke, impacting their ability to make their cases.⁵ As recently as October 28, Duke finally verified that it is seeking an annual revenue increase of approximately \$434.3 million, not the approximately \$395 million Duke has been telling the public and attesting to in its case-in-chief.⁶ Moreover, it will not be those parties or their counsel who will bear the inherently prejudicial consequence of that inability to present evidence, but Duke’s more than 800,000 ratepayers who are entitled to just and reasonable rates. As matters now stand, the non-Duke parties will not only be deprived of administrative due process, but all Duke ratepayers will be deprived of their statutory and constitutional rights to just and reasonable rates. Thus, Joint Movants respectfully urge the Commission to reverse the October 28th docket entry and grant the relief sought in their Joint Motion of October 15.

WHEREFORE, Joint Movants respectfully request the Commission reverse the October 28th Docket Entry in this proceeding and order that:

1. Duke must refile its MSFRs, workpapers, and exhibits so that the Excel sheets are linked to each other and follow the logical chain of evidence. This is standard practice and has not been an issue with other Indiana electric utilities in recent general rate cases. *See, e.g.*, MSFRs, workpapers, and exhibits filed by Petitioners in Cause Nos. 44967, 45029, 45159, and 45235. Without the requested relief, Joint Movants will not and have not been able to adequately prepare their responsive cases-in-chief.
2. Duke must refile any discovery responses that do not have formulas intact or linked spreadsheets. This is also standard practice and provides the necessary transparency. Without the requested relief, it leaves parties without a clear path forward in terms of preparing our cases-in-chief.

⁵ *E.g.*, JI Exhibit 1, p. 4, lines 5-6, and Attachment JFW-3.

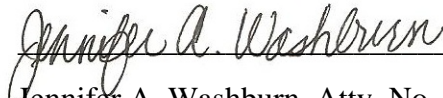
⁶ IG Witness Gorman Direct, pp. 13-16, and Attachment MPG-1.

3. Joint Movants respectfully request that the Commission alter the procedural schedule and provide the OUCC and intervenors with a 3-week extension of their filing date beginning with the date by which Duke refiles its MSFRs, workpapers, and exhibits so that the Excel sheets are linked to each other and follow the logical chain of evidence.
4. Joint Movants also respectfully request expedited discovery turnaround for discovery requests related to Duke's COSS.
5. Joint Movants further request oral argument on the matters raised by the Joint Motion which are so critical not only to fundamental rights in the case currently before the Commission but in all future rate cases subject to Ind. Code § 8-1-2-42.7

At a minimum, Joint Movants alternatively request that the Commission at least rule to explicitly grant the non-Duke parties leave to supplement their testimony and the three weeks' additional time and expedited discovery their affidavits show would be required to do so.

CAC is authorized to sign on behalf of Joint Movants.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served by electronic mail this 6th day of November to the following:

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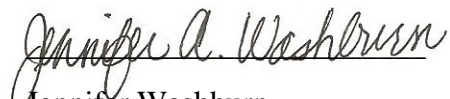
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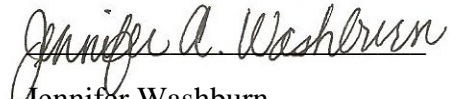
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VERIFICATION

The undersigned hereby verifies that the facts alleged in this Motion are true and correct to the best of my knowledge.


Jennifer Washburn